No. 93-1462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,

vs.

JOSÉ RAMÓN MORALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE CITIZENS FOR LAW AND ORDER IN SUPPORT OF PETITIONERS

KEVIN WASHBURN
Citizens for Law
and Order
P. O. Box 13308
Oakland, CA 94661
Telephone:
(510) 531-4664

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amici Curiae

*Attorney of Record

QUESTION PRESENTED

Does the *Ex Post Facto* Clause apply to a rule of procedure that does not increase the punishment for crime simply because it would be adverse to the interests of some prisoners?

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INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Citizens for Law and Order (CLO) is a nonprofit corporation dedicated to encouraging law-abiding citizens to actively involve themselves in the support of law enforcement agencies and other organs of justice through educational, informational, and civic programs. CLO is committed to the principle that all citizens have a basic right to live in physical

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1. Both parties have given written consent to the filing of this brief.

safety and that victims of crime should be restored to a central position within the criminal justice system.

The present case involves an unwarranted expansion of the *Ex Post Facto* Clause into rules of procedure. This unwarranted interference with California law, if upheld, will waste precious resources in a criminal justice system that is already stretched to its limits. Even more importantly, upholding the decision below will force the victims of some of the worst crimes to needlessly relive their trauma. This waste and pain is contrary to the interests that CJLF and CLO were formed to advance.

SUMMARY OF FACTS AND CASE

In 1971 respondent was convicted of the first-degree murder of his girlfriend. When her body was found, it was discovered that her thumb had been cut off. Soon after being transferred to a halfway house in 1980, he married a woman who met him during his imprisonment. One month after his marriage, respondent was paroled. Morales' wife disappeared two months later. Except for one hand, her body has never been recovered. *Morales* v. *California Department of Corrections*, 16 F. 3d 1001, 1002 (CA9 1994).

Respondent plead *nolo contendere* to the second-degree murder of his wife, and was sentenced to 15 years to life imprisonment. *Ibid*. At the time he murdered his wife, all California prisoners were entitled to annual parole eligibility hearings once they were eligible for parole. A subsequent change in California law, Cal. Penal Code § 3041.5(b)(2)(B), allowed the parole board to defer the hearing up to three years if the prisoner's crime

involved multiple murders. 16 F. 3d, at 1003. Morales' earliest possible parole date was August 2, 1990. After finding Morales unfit for parole at that time, the California Board of Prison Terms set Morales' next eligibility hearing for three years later. *Id*., at 1002-1003.

Respondent challenged the delay in his parole hearing through federal habeas corpus. The District Court rejected his claim. See *id*., at 1003. The Ninth Circuit reversed, finding

that the retroactive application of the change in California law to Morales violated the *Ex Post Facto* Clause. *Id*., at 1006.

SUMMARY OF ARGUMENT

The *Ex Post Facto* Clause was designed by the Framers to enshrine the common law's disdain for *ex post facto* legislation into a constitutional prohibition. As explained in Justice Chase's opinion in *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386 (1798), this prohibition guarded against gross vindictive abuses of legislative power that resulted in retroactively expanding crimes, reducing defenses, or increasing punishments. The Clause was not, however, intended to prevent the retroactive application of changes in procedure.

The Clause was expanded beyond its common law roots, however, in *Kring* v. *Missouri*, 107 U. S. 221 (1883) and *Thompson* v. *Utah*, 170 U. S. 343 (1898) which allowed *ex post facto* attacks against changes in procedure that limited the substantial rights of defendant. Until recently, *Calder* and *Kring* formed parallel lines of reasoning in this Court's *ex post facto* cases. The uneasy truce between the two lines has allowed for dicta in several decisions that needlessly expanded the scope of the Clause.

The tension between the *Calder* and *Kring* lines was broken in *Collins* v. *Youngblood*, 497 U. S. 37 (1990), which overruled *Kring* and *Thompson*, returning the *Ex Post Facto* Clause to its common law roots. The renaissance of common law principles has led to the re-emergence of procedure in *ex post facto* analysis. Although procedure cannot be used as a mere label, those laws that may be fairly termed as procedural are exempt from the limits of the clause.

In addition to overruling *Kring* and *Thompson*, *Youngblood* also undercut the expansive dicta that relied on these two cases. While most of this Court's treatment of *Kring* and *Thompson* was innocuous, several cases, particularly *Weaver* v. *Graham*, 450 U. S. 24 (1981) and *Lindsey* v. *Washington*, 301 U. S. 397 (1937), deserve careful re-examination given their reliance on *Kring* and *Thompson*. Although none of these decisions need to

be overruled, a careful paring down of dicta is necessary to harmonize them with *Youngblood*.

In light of *Youngblood*, the fact that a change in the law is adverse to defendant and relates to punishment is no longer sufficient to invoke the *Ex Post Facto* Clause. Once again, the Clause affects only those laws that actually increase the punishment for crimes.

A change in law will increase the punishment for crime in one of four ways: adding a new punishment, increasing the type of punishment, increasing the effective level of punishment, or increasing the minimum or maximum indeterminate sentence.

The change in California's parole law does not fit into any of these four categories. It is not a vindictive abuse of legislative power, but is instead a scheduling rule designed to use California's resources more efficiently and minimize the trauma to victims of crime and their families. As it is best viewed as a rule of procedure, the change in California law does not violate the *Ex Post Facto* Clause.

ARGUMENT

I. *Collins* v. *Youngblood* re-established the substance versus procedure distinction as the primary issue in *Ex Post Facto* Clause cases.

The *Ex Post Facto* Clause[2] has the distinct advantage of having had a clear, common law meaning when the Constitution was written. See *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). The original definition of an *ex post facto* law was:

2. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U. S. Const. art. I, § 10, cl. 1. As the present case does not involve a federal prosecution, the similar restriction on Congress does not apply. See U. S. Const. art. I, § 9, cl. 3.

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*." *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386, 390 (1798) (opinion of Chase, J.) (emphasis in original); accord, *Youngblood*, *supra*, 497 U. S., at 41-42; *Dobbert* v. *Florida*, 432 U. S. 282, 292 (1977); *Beazell* v. *Ohio*, 269 U. S. 167, 169-170 (1925); *Fletcher* v. *Peck*, 6 Cranch (10 U. S.) 87, 138 (1810).

As the citations above testify, the common law definition of *Calder* has always been accorded respect. Unfortunately, it has not always been followed. A series of cases evolved around the proposition that any change sufficiently detrimental to the defendant was *ex post facto* if retroactively applied, even if the law did not fit into any of the categories established by *Calder*. This needless expansion pushed the interpretation of the *Ex Post Facto* Clause away from its original emphasis on distinguishing between substantive and procedural changes, moving it towards an inquiry into whether the changed law caused *any* significant disadvantage to the defendant. See *Weaver* v. *Graham*, 450 U. S. 24, 29 (1981).

Youngblood reversed this trend. By re-establishing the roots of the *Ex Post Facto* Clause, *Youngblood* brings back to the forefront the substance/procedure dichotomy. It is no longer enough that the change in law disadvantaged defendant. If it can be fairly termed procedural, a change in the law may be applied retroactively without violating the *Ex Post Facto* Clause.

A. Historical Background.

1. Common law roots.

Since *Youngblood* has returned the *Ex Post Facto* Clause to its common law roots, any interpretation of the Clause must start with the source of its common law meaning, Justice Chase's

opinion in *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386 (1798). The *Calder* Court saw the *Ex Post Facto* Clause as a reaction to Parliament's tendency to act as both legislature and court when pursuing its enemies. The problem was when Parliament, through "bills of attainder, or bills of pains and penalties" would attack its enemies "by declaring acts to be treason, which were not treason, when committed" changing the rules of evidence "to supply a deficiency of legal proof," punishing what had previously been unpunished, or by inflicting "greater punishments, than the law annexed to the offense." *Id.*, at 389 (opinion of Chase, J.) The reason given by Parliament for these acts was "that the safety of the kingdom depended upon the death, or other punishment of the (allegedly traitorous) offender . . . ." *Ibid.* As Justice Chase noted, this masked Parliament's real, darker motive. "With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice." *Ibid.*

It was incompatible with the basic notions of republican government to grant this vindictive power to any legislature. See *id.*, at 388-389. Yet there were limits to the reach of the Clause. The prohibition against *ex post facto* was centered over the legislatures' extensive powers to define and punish unlawful conduct. Although the state legislatures' primacy in substantive criminal law was unquestioned, "they [the legislatures] cannot change innocence into guilt; or punish innocence as a crime . . . ." *Id.*, at 388. But the states had even greater freedom in procedural matters. "The establishing courts of justice, . . . the appointment of judges, *and the making of regulations for the administration of justice*, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province, and duty of the state legislatures." *Id.*, at 387 (emphasis added).

The fact that legislation applied retroactively was not enough to violate the *ex post facto* principles. Only statutes that increased the harshness of the substantive criminal law could not be applied retroactively. See *id.*, at 391. The *Ex Post Facto* Clause was not concerned with micromanaging changes in state procedure. It was meant to prevent the gross, vindictive abuses of legislative power that visit necessarily unforeseen consequences on the innocent actor. See 1 W. Blackstone, Commen-

taries 46 (1st ed. 1765); *Calder*, 3 Dall., at 391 ("The celebrated and judicious Sir William Blackstone, in his commentaries, considers an *ex post facto* law precisely in the same light I have done").

2. *Parallel development.*

Although this Court's decisions have always respected the common law principles of *Calder*, see *ante*, at 5, a parallel line of reasoning developed that provided an alternative means for finding *ex post facto* violations. In *Kring* v. *Missouri*, 107 U. S. 221 (1883), the Court chose to depart from the common law roots of *Calder*. Under the expansive interpretation given by *Kring*, state procedures were no longer exempt from the Clause. Keeping procedural matters from the reach of *ex post facto* would destroy "the value of the constitutional provision . . . ." *Id.*, at 232. It would keep changes "with regard to bail, to indictments, to grand juries, to the trial jury" immune from the reach of the Clause, denying substantial rights given to "the defendant at the time to which his guilt relates . . . ." *Id.*, at 232. The *Ex Post Facto* Clause had to be protected to expand these important procedural rights. So the *Kring* Court expanded the Clause's scope, finding that a law that " 'alters the situation of a party to his disadvantage' is an *ex post facto* law . . . ." *Id.*, at 235 (quoting *United States* v. *Hall*, 26 F. Cas. 84, 86 (D. Pa. 1809) (No. 15,285)). This rationale was subsequently used to strike down the retroactive application of a procedural rule that decreased the size of juries in criminal cases. See *Thompson* v. *Utah*, 170 U. S. 343, 352-353 (1898).

While this Court expanded the *Ex Post Facto* Clause beyond its common law roots, it was still paying heed to Justice Chase's opinion in *Calder*. In *Hopt* v. *Utah*, 110 U. S. 574 (1884), a change in the law making felons competent to testify, see *id.*, at 587-588, was found not to be *ex post facto* because the changed rule was procedural. Since it did not come within one of the categories first announced in *Calder*, compare *id.*, at 590, with *Calder*, *supra*, 3 Dall., at 390, the change "relate[s] to modes of procedure only, in which no one may be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." *Hopt*, *supra*, 110 U. S., at 590.

These two schools of thought, the procedural, common law-based analysis found in *Calder* and *Hopt*, and the expansive, substantial right analysis found in *Kring* and *Thompson*, took parallel paths through this Court's *ex post facto* decisions. In spite of the potential for conflict, this Court did not resolve the tensions between these two lines until *Youngblood*. See *post*, at 11-12. Thus, *Hopt*, which dismisses defendant's claim as procedural, still cites with approval the analysis of the *Kring* decision, a case that condemned procedure-based limits to the *Ex Post Facto* Clause. See *id.*, at 588-589; *Kring*, *supra*, 107 U. S., at 232.

This type of accommodation, judicial slaloming between the poles of *Calder* and *Kring*, became this Court's basic method of analyzing the *Ex Post Facto* Clause. See, *e.g.*, *Duncan* v. *Missouri*, 152 U. S. 377, 382-383 (1894); *Malloy* v. *South Carolina*, 237 U. S. 180, 183-184 (1915); *Beazell* v. *Ohio*, 269 U. S. 167, 171 (1925); *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977). Sadly, this finesse only caused confusion in the lower courts. See *Collins* v. *Youngblood*, 497 U. S. 37, 45 (1990).

The dissonance between *Calder* and *Kring* grew even louder in three of this Court's most recent decisions involving violations of the Clause. These cases, *Lindsey* v. *Washington*, 301 U. S. 397 (1937), *Weaver* v. *Graham*, 450 U. S. 24 (1981), and *Miller* v. *Florida*, 482 U. S. 423 (1987), each involved one of the most difficult issues under the Clause—when did a law actually increase the punishment for a crime. See 1 W. La Fave & A. Scott, Substantive Criminal Law § 2.4(a), at 136 (1986). The difficulty of these cases led this Court to derive dicta from the principles of *Kring* in order to buttress the results it reached.

Lindsey, which will be discussed in greater detail later, see *post*, at 23-24, involved a very complex change in sentencing law that replaced the old indeterminate sentencing scheme with a new system where a determinate sentence was set by the parole board. See 301 U. S., at 398-399. Although it could and effectively did conclude that this new system increased the punishment for crime, see *id.*, at 401; *post*, at 23-24, the *Lindsey* Court chose to go further. Relying on *Kring*, *Lindsey* also stated that "we need not inquire whether this [change] is technically an increase in the punishment" since it was to defendant's "substantial disadvantage . . . ." *Id.*, at 401-402. Given the fact that

defendants were incarcerated longer because of the change, this assertion was unnecessary to the final decision.

The move towards *Kring* was strongest in *Weaver*. *Weaver* involved several changes in the calculation of gain-time credits that reduced the time spent in prison. 450 U. S., at 25-26. While *Weaver* did find that these changes violated the common law principles of the Clause by increasing the punishment for crimes, see *post*, at 19-21, *Weaver* also engaged in a subtle and significant expansion of the *Ex Post Facto* Clause.

The *Weaver* Court asserted that "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. *Dobbert* v. *Florida*, 432 U. S. 282, 298 (1977); *Kring* v. *Missouri*, 107 U. S. 221, 229 (1883); *Calder* v. *Bull*, *supra*, at 387." *Weaver*, *supra*, 450 U. S., at 28-29. This statement seeks to prove more than it can. The common law rationale behind the Clause was meant to give individuals fair warning of the legality of their acts. See 1 W. Blackstone, Commentaries 46 (1st ed. 1765). It is also fair to infer that fair warning of the legality of an act also includes fair warning of the consequences of the act. Thus, as *Dobbert* notes, the *Ex Post Facto* Clause does require fair notice of the actual punishment accorded to a crime. *Dobbert*, *supra*, 432 U. S., at 298.

The problem with *Weaver* is that it did not stop there. It did not qualify its mandate of fair warning. *Weaver* therefore implicitly requires warning of the effect of *all* "legislative Acts." None of the cases cited by *Weaver* can support this proposition. As noted above, *Dobbert* simply states that individuals must be given fair warning of the penalty for a crime. The page of *Calder* cited by *Weaver* does not address the issue of fair warning. It only contains a discussion of the facts, a recitation of the broad powers of state legislatures, and the importance of the issues of legislative overruling of court decisions. See *Calder*, *supra*, 3 Dall., at 387. The only support for *Weaver*'s sweeping assertion comes from a single unattributed statement from *Kring*, the case that broke from *Calder*, that the purpose of the Framers of the Clause was "to protect the individual rights of life and liberty against hostile retrospective legislation." *Kring*, *supra*, 107 U. S., at 229.

The importance of *Weaver*'s assertion is shown by the broad test of unconstitutionality it established:

> "In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.[12]

"[12] We have also held that no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' *Hopt* v. *Utah*, 110 U. S. 574, 590 (1884). See *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977). Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. *Thompson* v. *Utah*, 170 U. S. 343, 354-355 (1898), *Kring* v. *Missouri*, *supra*, at 232." 450 U. S., at 29 (footnote 11 omitted).

This completed the break with *Calder*. The procedure question was irrelevant,and the *Ex Post Facto* Clause guaranteed to defendant immunity from any significant threat of retroactive legislation. It did not matter if the legislation neither expanded criminal liability nor increased punishment. *Any* "legislative Act" that "disadvantage[d] the offender affected by it" violated the *Ex Post Facto* Clause. *Kring* and *Thompson* were established as the foundations of analysis under the Clause.

Miller v. *Florida*, *supra*, reflected the importance of *Weaver*. *Miller* involved a change in Florida's sentencing guidelines which caused offenders such as Miller to be given a higher presumptive sentence than before the change. 482 U. S., at 424. The *Miller* Court recognized the importance of *Calder*, reciting Justice Chase's four categories, see *id.*, at 429, but *Miller* also cited with approval *Weaver*'s expansive view of the intent of the Framers of the Clause. *Id.*, at 430. It noted the "disadvantage the offender" language of *Weaver*, while at the same time recognizing that procedural changes that do not alter " 'substantial personal rights' " were not *ex post facto*. *Id.*, at 430 (quoting *Dobbert*, *supra*, 432 U. S., at 293).

Miller was, in many ways, the typical *ex post facto* case before *Youngblood*. It pays homage to the common law origins of the *Ex Post Facto* Clause that were first expounded in *Calder* yet it contains language derived from *Kring* and *Thompson*, cases that expanded the Clause beyond its original intent. In the end, however, because the change in law actually increased the punishment of the crime, it was unnecessary to expand the Clause beyond its common law meaning in order to rule in favor of defendant. See *id.*, at 435. Thus *Calder* and *Kring* continued to run their parallel courses through the *Ex Post Facto* Clause.

B. Youngblood.

The parallel development of the *Ex Post Facto* Clause was shattered in this Court's most recent interpretation of the Clause, *Collins* v. *Youngblood*, 497 U. S. 37 (1990). For the first time since *Thompson* v. *Utah*, 170 U. S. 343 (1898), this Court had to decide whether a purely procedural change in the law could violate the *Ex Post Facto* Clause. See 497 U. S., at 44. The *Youngblood* Court rejected the notion that such a change could be *ex post facto*, placing the Clause firmly back on its common law foundation.

In order to reject this challenge, *Youngblood* had to confront and dispose of the expansion of the *Ex Post Facto* Clause in *Kring* and *Thompson*. It recognized that prior decisions such as *Beazell* v. *Ohio*, 269 U. S. 167 (1925) and *Duncan* v. *Missouri*, 152 U. S. 377 (1894) did seem to intimate that there was a "substantial protection" exception to the rule that procedural changes did not violate the Clause. See 497 U. S., at 45-46. But it also noted that "this language from the cases cited has imported confusion into the interpretation of the *Ex Post Facto* Clause." *Id.*, at 45. Instead of recognizing a broad, "substantial protection" exception to the procedure rule, *Youngblood* reduced these statements to their common sense minimum.

> "We think the best way to make sense out of this discussion in the cases is to say that by simply *labeling* a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto Clause*." *Id.*, at 46 (emphasis added). This interpretation simply reflects a very basic rule of law. "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934). A

court must examine what the law actually does, as opposed to what it is called by others. Thus, if Congress were to increase the penalty for bank robbery by amending one of the Federal Rules of Criminal Procedure, this procedural label would not immunize the change from the *Ex Post Facto* Clause.

On the other hand, if a changed law truly is procedural, then it can be retroactively applied without violating the Clause. Only changes in substantive criminal law—changes in the definition or punishment of crimes as defined by *Calder*—were subject to the *Ex Post Facto* Clause. 497 U. S., at 46. *Youngblood* thus reasserted the importance of procedure in *ex post facto* analysis. The only exception to procedure's immunity from the Clause, the "altered the situation to his disadvantage" rule of *Kring* and *Thompson*, was an unjustified expansion of the Clause beyond its original understanding. *Id.*, at 49. Therefore, these cases had to be overruled, *id.*, at 50-52, returning the Clause to its common law roots.

Youngblood is more important than the simple removal of *Kring* and *Thompson* from the case law. These overruled decisions had an important impact on this Court's interpretation of the Clause, justifying needlessly expansive dicta in several of this Court's cases. See *ante*, at 8-11. Removing the residue of *Kring* and *Thompson* from this Court's decisions will complete the *Youngblood* Court's task of clarifying the *Ex Post Facto* Clause.

C. Youngblood's Impact.

The *Youngblood* Court noted that none of this Court's decisions followed the reasoning of *Kring* v. *Missouri*, 107 U. S. 221 (1883) and *Thompson* v. *Utah*, 170 U. S. 343 (1898). *Collins* v. *Youngblood*, 497 U. S. 37, 47 (1990). This reflects the fact that this Court never had to rely upon *Kring* or *Thompson* as a rule of decision. Whenever this Court found a violation of the Clause, there were sound common law reasons for ruling in defendant's favor. See *ante*, at 8-11. This does not, however, mean that *Kring* and *Thompson* had no influence in this Court's decisions. Their influence in dicta was significant, see *ante*, at 8-11, and this influence must be removed in order to complete the overruling of *Kring* and *Thompson*.

The most vivid examples of the influence of *Kring* and *Thompson* are found in *Weaver* v. *Graham*, 450 U. S. 24 (1981). As noted earlier, *Weaver* relied upon *Kring* and *Thompson* to support dicta that would substantially expand the scope of the *Ex Post Facto* Clause. See *ante*, at 10. Perhaps the most dangerous statement to come out of *Weaver* is its test for examining *ex post facto* claims, that for a statute to be *ex post facto* "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must *disadvantage the offender affected by it.*" 450 U. S., at 29 (emphasis added) (footnotes omitted). This assertion was heavily dependent upon *Kring*'s and *Thompson*'s expansion of the *Ex Post Facto* Clause. See *ante*, at 9-10. *Youngblood*'s overruling of *Kring* and *Thompson* means that the sweeping scope of the *Weaver* dicta is no longer valid authority.

Once the references to *Kring* and *Thompson* are removed, the *Weaver* dicta becomes a valid statement of the *Ex Post Facto* Clause's reach, preventing the retroactive application of statutes that " 'increase the punishment [or] change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " 450 U. S., at 29, n. 12 (quoting *Hopt* v. *Utah*, 110 U. S. 574, 590 (1884)). The problem with *Weaver* is that this crucial qualifying statement is buried in a footnote. By itself, the "disadvantage the offender" language found in the text is much too broad in light of *Youngblood*. In order for a court, prosecutor, or legislator to make an accurate assessment of the law after *Youngblood*, an individual must read the statement in light of the first half of footnote twelve, but must disregard the latter half of the footnote. A much better solution is to disregard the *Weaver* test. To the extent that it reflects Justice Chase's test in *Calder*, it is redundant. The remainder of *Weaver* that goes beyond *Calder* is both inaccurate and confusing.

Weaver's potential to confuse is demonstrated in the present case, where the Ninth Circuit dismissed California's procedural argument with the following unadorned statement: "However, a law that violates the core concerns of the *ex post facto* clause 'is not merely procedural, even if the statute takes a procedural form. *Weaver*, 450 U. S., at 29, n. 12 . . . .' " *Morales* v. *California Department of Corrections*, 16 F. 3d 1001, 1004 (CA9 1994).

The Ninth Circuit fails to note that the two cases cited by *Weaver* to support this proposition were the now-overruled *Kring* and *Thompson*. See *ante*, at 10, *Weaver*, *supra*, 450 U. S., at 29, n. 12. Furthermore, this "procedural form" notion has now been carefully circumscribed by *Youngblood* to mean no more than that the simple labelling of something as procedural is irrelevant. See *ante*, at 11-12. While careful analysis could lead a court to the right result using this *Weaver* language, the Ninth Circuit does not make the careful examination that is needed to interpret *Weaver* properly. See *post*, at 27-28. *Weaver* needs to be explained again in order to avoid similar mistakes in the future.

"Disadvantage the offender" has the additional problem of focusing too much upon the defendant's adversity. Adversity to defendant is not by itself enough to justify imposing the *Ex Post Facto* Clause, even if the adverse legislation relates to guilt or punishment. Thus reducing the number of jurors, which can be adverse to defendant's interest in avoiding a guilty verdict[3], no longer violates the Clause. *Youngblood*, *supra*, 497 U. S., at 51-52. What only matters now is whether a statute

> "[p]unishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ." *Id.*, at 42 (quoting *Beazell* v. *Ohio*, 269 U. S. 167, 169-170 (1925)).

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3. In *Williams* v. *Florida*, 399 U. S. 78 (1970), this Court found that a reduction in jury size from twelve to six members was not so clearly disadvantageous to defendant as to be unconstitutional. On the other hand, the *Williams* Court did recognize that there were times that a sufficiently great reduction in jury size could appreciably reduce defendant's chance of getting a hung jury. *Id.*, at 101, n. 47. While the reduction in jury size condemned in *Thompson* may not have been adverse to defendant's interest in avoiding a guilty verdict, after *Youngblood*, even greater changes in jury size, which would increase the likelihood of guilty verdicts, would not be subject to *ex post facto* limitations.

The fact that an act can disadvantage defendant with regards to guilt or penalty and not implicate the *Ex Post Facto* Clause involves a subtle distinction that this Court should make explicit. While doing so, this Court should disapprove the confusing "disadvantage the offender" language in *Weaver* that relied upon the overruled *Kring* and *Thompson* decisions.

For similar reasons, this Court should also recognize the diminished authority of *Weaver*'s statement that "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." 450 U. S., at 28-29. To the extent that it refers to expanding the scope of crir . or the level of punishment, it is an accurate statement of the Framers intent to reproduce the common law. See *ante*, at 6-7. But the broader, literal reading, that any type of "legislative Acts" must give fair warning was not within the intent of the Framers. The only plausible authority for *Weaver*'s assertion, *Kring*, is now overruled. See *Collins*, *supra*, 497 U. S., at 50. This unwarranted extension of history should be disapproved. The primary purpose behind the Clause was to prevent legislative vindictiveness, see *ante*, at 6, and this Court once again recognizes this.

This does not, however, require the overruling of *Weaver*. The changes in Florida law did retroactively increase the punishment for crimes, a violation of the *Calder* principles. See *post*, at 19-21. Disapproving the two offending phrases does no more than harmonize *Weaver* with the changes initiated by *Youngblood*.

This Court's other *Ex Post Facto* Clause cases require less extensive adjustment. *Miller* v. *Florida*, 482 U. S. 423 (1987), although it restated the *Weaver* dicta, was decided according to the principles of *Calder*. See *ante*, at 10-11. Once the *Weaver* dicta is disapproved, *Miller* is consistent with *Youngblood*.

The influence of *Kring* in the other decisions was to cause this Court to recite *Kring*'s "substantial protection" theme. See *ante*, at 8-9. Since this aspect of *Kring* was overruled in *Youngblood*, it follows that subsequent restatements of the *Kring* holding are equally invalid. A statement to that effect in the present case would clear any confusion caused by *Youngblood*'s assertion that no case had ever followed *Kring* or *Thompson*.

See 497 U. S., at 47. Finally, the statement in *Lindsey* v. *Washington*, 301 U. S. 397 (1937), that it was not necessary to examine whether defendant was punished more severely if a charge was to his "substantial disadvantage," *id.*, at 401, must be cut back. Only changes in law that punish a person more severely actually violate the Clause.

The most important effect of *Youngblood* is the re-emergence of procedure as a primary issue in *Ex Post Facto* Clause analysis. While procedure can be used as a label, see *id.*, at 46; *Gibson* v. *Mississippi*, 162 U. S. 565, 590 (1896), it has a distinct meaning that is most relevant to the interpretation of the *Ex Post Facto* Clause.

Substance and procedure are well-defined, mutually exclusive aspects of the law. Substance is "[t]hat part of the law which creates, defines, and regulates rights and duties of parties . . . ." Black's Law Dictionary 1429 (6th ed. 1991). As it applies to criminal law, substance refers to declaring "what conduct is criminal and prescribes the punishment to be imposed for such conduct." 1 La Fave & Scott, *supra*, § 1.2, at 8. This is essentially the type of legislation that cannot be imposed retroactively under the common law principles revived in *Youngblood*. See 497 U. S., at 52.

Procedure, on the other hand, is the antithesis of substantive law, the "method of enforcing the rights or obtaining redress for their invasion." Black's Law Dictionary, *supra*, at 1429. Thus criminal procedure is "concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of the punishment." 1 La Fave & Scott, *supra*, § 1.1, at 2.

After *Youngblood*, these procedural matters are no longer subject to the limits of the *Ex Post Facto* Clause.[4] The only impediment to removing procedural matters from the Clause was

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4. Professor La Fave lists a third area of criminal law that is separate from substance or procedure, the administration of criminal justice. *Ibid.* This field, which includes such matters as "police organization and administration . . . prison administration, and administration of probation and parole," see *ibid.* (footnotes omitted), would also be considered procedural for the purpose of interpreting the *Ex Post Facto* Clause.

the "substantial protection" language of *Kring*, see *ante*, at 7. *Youngblood*, by overruling *Kring* and *Thompson*, eliminated the sole roadblock to immunizing procedural changes from judicial interference.

Although procedure is important, it is not the ultimate issue in *Ex Post Facto* Clause analysis. Cases will turn on whether a change in law expanded crimes, reduced defenses, or increased punishment. See *Youngblood*, *supra*, 497 U. S., at 52. But in close cases, whether a law is best considered substantive or procedural, can be decisively important. Therefore, procedure counts once again.

II. A change regarding the punishment does not violate the *Ex Post Facto* Clause unless it adds a new punishment, or increases the type of punishment, the effective level of punishment, or the minimum or maximum indeterminate sentence.

Of the various aspects of substantive criminal law covered by the *Ex Post Facto* Clause, changes relating to punishment create the most analytical problems. See *ante*, at 8. This comes as no surprise given the enormous growth and complexity of the law of sentencing. Punishment under the common law system in effect at the origin of the *Ex Post Facto* Clause was relatively a straightforward affair. Many crimes were capital, see 4 W. Blackstone, Commentaries 18 (1st ed. 1769), other punishments, while varied and often quite cruel, were well established and readily ascertained. See *id.*, at 370-371.

Punishment has become more complex in the subsequent two centuries. Indeterminate sentencing, probation, parole, aggravating factors, mitigating factors, special circumstances, and sentencing guidelines are just some of the innovations that have turned punishment of crimes into one of the most complicated areas of the law. Fitting this body of law to the common law principles established in *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386 (1798) can tax even the most able courts in close cases.

Although difficult, it is by no means impossible to determine when a statute increases the punishment for a crime. As the law of punishment has evolved, this Court has dealt with the

increased scope and complexity of punishment in its *Ex Post Facto* Clause cases. Harmonizing this Court's "accretion of case law," *Dobbert* v. *Florida*, 432 U. S. 282, 292 (1977), with the common law principles of *Calder*, will provide the lower courts with a clear, relatively concise guide to when punishment statutes violate the *Ex Post Facto* Clause.

The best way to organize this Court's *ex post facto* punishment cases is to break them down into the common ways that punishment has been increased. These categories will provide the lower courts with the necessary guidance to determine when a change actually makes the substantive criminal law more punitive.

A. Adding New Punishment.

Perhaps the most straightforward example of an *ex post facto* punishment is the statutory change that creates a new, additional punishment while retaining the old, such as a statute adding a fine to what had previously been just a term of imprisonment. As a matter of logic, if a statute retains an old punishment while adding a new one it must increase the punishment for the crime.

An example of this type of statute is found in *In re Medley*, 134 U. S. 160 (1890). In this case the old statute affixed the death penalty to defendant's crime, first-degree murder. See *id.*, at 167. The new statute added the requirement that the time a defendant served before execution must be spent in solitary confinement. *Id.*, at 163-164. Although it would appear to be difficult to increase a penalty set at death, *Medley* demonstrates that any added penalty violates the *Ex Post Facto* Clause. Since solitary confinement would make the time before defendant's execution worse than it previously was, see *id.*, at 170, the change in the law "was an additional law of the most important and painful character, and is, therefore, forbidden by" the *Ex Post Facto* Clause. *Id.*, at 171. If a punishment added to the death penalty can violate the Clause, then any other instance of added punishment must also violate the Clause.

B. More Severe Form.

This type of *Ex Post Facto* Clause violation is more theoretical than practical. The various punishments a legislature may constitutionally impose as penalties for crime can be arranged on a spectrum from most to least severe. A formal warning would be the least severe penalty, followed by a fine, then probation, then imprisonment, with the death penalty being the most severe. A statute that substituted a more severe form of punishment for a lesser penalty would violate the *Ex Post Facto* Clause. Therefore, a legislature could not retroactively change the punishment for littering from a simple fine to a term in prison. Since this is so obviously a violation of the Clause, lower courts and legislatures never violate it. Thus, this Court has not dealt with this type of violation. Nonetheless, this type of change violates the Clause, and any comprehensive definition should include this type of heightened punishment.

C. Increased Effective Level.

The *Ex Post Facto* Clause prohibits more than the retroactive application of different types of punishment. The Clause also prohibits taking the same type of punishment to a higher level. Thus a legislature may not retroactively change the punishment for burglary from six to eight years imprisonment. This is an increase in the "quantum of punishment" and therefore is contrary to the *Ex Post Facto* Clause. See *Dobbert* v. *Florida*, 432 U. S. 282, 294 (1977).

Unfortunately, changes in sentencing law are not always this straightforward. Two of this Court's most recent *Ex Post Facto* Clause cases show how difficult it can be to determine when the level of punishment is increased. Concentrating on the effective level of punishment imposed alleviates the difficulties encountered by cases like *Weaver* v. *Graham*, 450 U. S. 24 (1981), where defendants are usually, but not necessarily, punished more severely by a change in the law.

As noted earlier, *Weaver* involved a change in Florida law reducing the amount of gain time credits automatically accrued by prisoners who committed disciplinary infractions while providing for extra discretionary good time based on other factors. See *id.*, at 26-27, 34, n. 18. The difficulty raised by

this change in the law was the relationship between the gain time credits and the defendant's sentence. As Florida noted, the credits were "no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced." *Id.*, at 31 (internal quotations omitted). Furthermore, as the Florida Supreme Court pointed out, " 'gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied.' " *Id.*, at 28 (quoting *Harris* v. *Wainwright*, 376 So. 2d 855, 856 (Fla. 1979). Thus, the changed statute did not directly increase the sentence given to defendant at the time of this sentence.

The way that *Weaver* dealt with these arguments is central to a comprehensive understanding of how sentences may be increased in violation of the *Ex Post Facto* Clause. Although the loss of gain time did not change the formal sentence, it effectively increased the time defendant would serve before being released. "[I]t is the effect, not the form of the law that determines whether it is *ex post facto*." *Weaver*, *supra*, 450 U. S., at 31 (footnote omitted). It was normal for prisoners to get their sentences reduced through gain time. An inmate was "*automatically* entitled to the monthly gain time for avoiding disciplinary infractions and performing his assigned tasks." *Id.*, at 35 (emphasis added). Thus, the change in the law effectively increased Weaver's sentence by lowering the virtually automatic accrual of good time. This increase in punishment violated the *Ex Post Facto* Clause. See *id.*, at 35-36.

Of equal analytical importance is the *Weaver* Court's treatment of the increased opportunity for discretionary gain time under the new law. If a change in the law ameliorates defendant's condition, then it may be imposed retroactively without violating the *Ex Post Facto* Clause. *Dobbert*, *supra*, 432 U. S., at 292. Therefore, if the increased opportunities for discretionary gain time canceled out the decreased opportunities for automatic gain time, there would be no *Ex Post Facto* Clause violation. The *Weaver* Court dismissed this possibility because of the subjective, ephemeral nature of discretionary gain time. "[T]he award of extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program." *Weaver*, *supra*, 450 U. S., at

35. Because the net effect of this change was so hypothetical, it could not be added to the sentencing calculus.

Miller v. *Florida*, *supra*, took the pragmatic approach of *Weaver* to a similarly tricky situation. The problem in *Miller* was that the change in law did not necessarily increase a defendant's sentence. Under Florida law, a series of sentencing guidelines created a presumptively correct sentence range. The sentencing judge could set a sentence within this range without any written explanation. Any departure from the guidelines, however, required a written explanation providing clear and convincing reasons for doing so. *Miller*, *supra*, 482 U. S., at 425-426. Subsequent changes in Florida law increased the number of "primary offense points" assigned to sex crimes by 20%. This had the effect of increasing the presumptive sentence range for sex offenders such as defendant. *Id.*, at 427.

The problem in *Miller* was that the new law did not change the statutory limits to the sentence. *Id.*, at 428. Because the changes only involved the calculation of a range of sentences the sentencing court could depart from, defendant could not "show definitively that he would have gotten a lesser sentence" under the old guidelines. *Id.*, at 432 (internal quotations omitted).

Once again, the effective sentence was key to finding an *Ex Post Facto* Clause violation. The presumptive sentence is a "high hurdle that must be cleared before [sentencing] discretion can be exercised, so that a sentencing judge may impose a departure sentence only after first finding 'clear and convincing reasons' that are 'credible,' 'proven beyond a reasonable doubt,' and 'not a . . . factor which has already been weighed in arriving at a presumptive sentence.' " *Id.*, at 435. Like the near automatic gain time credits in *Weaver*, receiving a sentence within the guidelines was the norm in *Miller*. The likelihood that most defendants would receive increased sentences meant that new law increased the punishment for crimes. Unlike a simple change in procedure, "[t]he 20% increase in points for sexual offenses . . . simply *inserts a larger number into the same equation*." *Id.*, at 433 (emphasis added). Thus the new guidelines did "increase the 'quantum of punishment' " and thus violated the *Ex Post Facto* Clause. *Id.*, at 434.

Weaver and *Miller* demonstrate that changes can increase punishment without changing the formal statutory sentence affixed to the crime. There must, however, be some certainty that the effective punishment actually is higher. As *Weaver*'s treatment of the discretionary gain time demonstrates, changes that have only a remote or speculative effect on the sentence cannot be included in the *Ex Post Facto* analysis. Relying on such conjecture would only increase the confusion surrounding the Clause that this Court sought to eliminate in *Youngblood*.

D. Increased Minimum or Maximum Sentence.

The cases that dealt with increased effective sentences both involved a fixed, determinate sentence. See *Weaver* v. *Graham*, 450 U. S. 24, 25, 26 (1981); *Miller* v. *Florida*, 482 U. S. 423, 426 (1987). Indeterminate sentencing, where the defendant is sentenced to a range of time in prison with an administrative body determining when to release the prisoner, see *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 732, 111 S. Ct. 2597, 2605-2606 (1991), involves different considerations. Because the length of the sentence is determined through administrative discretion, it is impossible to ascertain an effective sentence with the precision of the *Weaver* and *Miller* decisions.

Instead of attempting to guess how long a sentence defendant actually will serve, judicial resources are better spent examining whether changes in the law increase the minimum or maximum sentence. Under an indeterminate scheme, the minimum sentence is the nearest substitute that can be found for the effective sentences of *Weaver* and *Miller*. If a legislature increases the minimum sentence, then every defendant must serve more time before the possibility of being released. Since most defendants are likely to serve longer sentences as a result of this change, and none will have their sentences reduced, the situation is almost identical to the virtual certainty of an increased sentence found in *Weaver*. See *ante*, at 19-21.

An increased maximum sentence, although conceptually more complicated, should also be treated as violating the Clause. Since there is no guarantee how much of an indeterminate sentence a defendant will serve, it is uncertain that any defendant actually will be harmed by a higher maximum sentence. Nonetheless, the formal, statutory sentence is greater than it once

was. This makes the sentence defendant receives from the sentencing court worse than it would have been, even if an administrative authority may exercise its discretion to release defendant at an earlier date. Such discretionary authority is too uncertain to be entered into the sentencing calculus. See *Weaver*, *supra*, 450 U. S., at 35.

Focusing on the minimum and maximum indeterminate sentences is the best way to explain *Lindsey* v. *Washington*, 301 U. S. 397 (1937), this Court's most complex *Ex Post Facto* Clause case. The old Washington law described a classical indeterminate sentencing scheme, where the trial court sentenced defendant to a minimum and maximum sentence within the statutory range for the offense. Once defendant served the minimum sentence, the parole board had discretion to parole him. *Id.*, at 398. The new sentencing law required the trial court to sentence defendants to the statutory maximum for his crime. The parole board, however, was to set the actual, fixed term of years that defendant had to serve, provided that term did not exceed the statutory maximum. See *id.*, at 398-399.

The problem in *Lindsey* was that both schemes were so discretionary that it was impossible to determine if a defendant would necessarily spend more time in prison under the new scheme. See *id.*, at 399-400. Thus the Washington Supreme Court held that since the new law did not increase either the minimum or maximum statutory sentence for the crime, the change did not violate the *Ex Post Facto* Clause. *Ibid.*

The *Lindsey* Court got around this problem by examining the minimum sentence defendant must serve before being free of state control.

> "The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor." *Id.*, at 400-401.

Under the old law, defendant's minimum sentence before he was free from state control was the statutory minimum sentence. See *id.*, at 398. Therefore, the mandatory added parole term made the minimum sentence under the new statute more onerous than it was before the change. The change made "the maximum compulsory." *Id.*, at 401. This increase in the minimum sentence defendant was entitled to under the prior indeterminate scheme violated the *Ex Post Facto* Clause.

The four categories listed in this section should provide a comprehensive list of the way a penalty statute can violate the *Ex Post Facto* Clause. They deal with the substance of sentencing law—how long must defendant be imprisoned or what additional harms will be inflicted upon him. Anything outside of this core of sentencing law should be considered procedural and thus exempt from the Clause.

III. Because the change in California law only affected procedure, it may be retroactively applied to respondent without violating the *Ex Post Facto* Clause.

In deciding whether the change in California parole law that was applied to Respondent violated the *Ex Post Facto* Clause, it is important to consider what the changes actually accomplished. The fact that a statute is related to punishment and is adverse to defendant is not enough to implicate the *Ex Post Facto* Clause. See *ante*, at 14-15. Instead, this Court will go behind the formalities and examine the actual punitive effect of a change in the law,[5] See *Miller* v. *Florida*, 482 U. S. 423, 433 (1987). The only effect of the change in California law is to increase the time between parole eligibility hearings for certain criminals. See Cal. Penal Code § 3041.5(b)(2)(B). This does not increase a defendant's punishment under any of the four categories mentioned in part II of this brief. Instead, it is best viewed as a change in procedure, not motivated by vindictive interests, but

5. Since the changed probation procedure examined in the present case has no effect at all on the definition of crimes or defenses, there is no reason to discuss those aspects of the *Ex Post Facto* Clause.

by compassion to the victims of crime and a desire to allocate California's scarce resources more efficiently.

The parole hearing change does not affect the first two categories listed in part II. The punishment for defendant's crime, second-degree murder, remains an indeterminate term of fifteen years to life after the change in parole law. See Cal. Penal Code § 190(a). Thus the change in law neither added a new punishment to the old, see part II A, *ante*, at 18, nor substituted a new, more severe type of punishment for the old punishment for second-degree murder. See part II B, *ante*, at 19.

Nor did the change in California law effectively increase defendant's prison sentence. The effective sentence analysis found in *Weaver* v. *Graham*, 450 U. S. 24 (1981) and *Miller*, *supra*, is not suited to analyze indeterminate sentencing schemes. *Weaver* and *Miller* determined that the new laws violated the *Ex Post Facto* law because it was virtually certain that the changes would lead to increased prison sentences. *Weaver*, *supra*, 450 U. S., at 35-36; *Miller*, *supra*, 482 U. S., at 433.

The possibility that some defendants may have their sentences increased as a result of the new California law is too speculative for *Ex Post Facto* Clause analysis. The decision to grant parole is vested in the guided discretion of an administrative agency, the Board of Prison terms. See Cal. Penal Code § 3041(a)-(b). Although the board must give written reasons related to the timing or gravity of the prisoner's current or past offenses, see *id.*, subd. (a), it is up to the board to "establish criteria for the setting of release date." *Id.*, subd. (a). There are simply no guarantees when defendant will be released. Thus the timing of parole hearings, like the discretionary gain time credits in *Weaver*, is too remote to influence the calculus of the *Ex Post Facto* Clause.

Nor does the change in parole law conflict with the fourth category by increasing Morales' minimum or maximum indeterminate sentence. See part II D, *ante*, at 22-24. Defendants are still entitled to the possibility of being paroled at the expiration of the minimum sentence. See Cal. Penal Code § 3041(a). As noted above, nothing in the new law changes respondent's minimum or maximum sentence. This is not a "revision of a

statute providing for a maximum and minimum punishment by making the maximum compulsory." *Lindsey*, *supra*, 301 U. S., at 401. It instead deals with certain procedures relevant to the necessarily vague middle of indeterminate sentences.

The primary purpose behind the *Ex Post Facto* Clause is to prevent legislative vindictiveness. See *Calder* v. *Bull*, 3 Dall. (3 U. S.) 386, 388-389 (1798) (opinion of Chase, J.). The change in California law attacked by Morales has no punitive purpose. It is simply a new rule that gives the Board of Prison Terms more control of its scheduling. Allowing the Board of Prison Terms to act on the reality that some people are less amenable to immediate parole than others allows the Board to free up scarce resources. If it is extremely unlikely that a person will get parole in the near term, it makes more sense for the Board to devote its resources to those cases most worthy of its scarce resources of time and energy. A harried, overworked Board of Prison Terms may not be able to give each case the attention it deserves. Efficient application of its resources can only improve the quality of probation hearings. A prisoner has no legitimate interest in a strained, less accurate Board of Prison Terms. "No man has a legal right to have his case wrongly decided . . . ." 1 J. Wigmore, Evidence § 21, at 890 (Tillers rev. 1983). The efficiency and accuracy advanced by the new California law is not the legislative vindictiveness the *Ex Post Facto* Clause seeks to halt.

The change in parole law has an additional purpose that is even more benign. Parole eligibility hearings, particularly for multiple murderers such as Morales, can be very traumatic to the prisoner's victims and their families. As one woman, who was raped, beaten, strangled, set afire, and had her husband beaten to death said, " 'My life is fine until this issue [the parole hearing] comes up again, and then the pain and terror start over . . . .' " Popp, Bid to Deny Freedom for Killer, S. F. Chronicle, June 30, 1987, p. 4, col. 1 (quoting Annette Carlson). The families have a compelling interest in seeing that the killers of their loved ones are not set loose on society. Yet testifying at the eligibility hearing can only rekindle the pain of the murder. The change in California's parole law can spare the victims' families this annual trauma while preserving the prisoners' interest in the possibility of getting parole. Such

compassion is a far cry from the grossly vindictive abuses of Parliament that inspired the *Ex Post Facto* Clause.

Penal Code section 3041.5(b)(2)(B) is best viewed as a rule of procedure. It did not change, or even address, the actual term of years to be served by a convicted defendant. The change merely gave the Board of Prison terms more discretion in its scheduling of parole suitability hearings. Scheduling statutes like this are a quintessential part of criminal procedure, "the steps through which a criminal proceeding passes . . . ." 1 W. La Fave & A. Scott, Substantive Criminal Law, § 1.1, at 2 (1986). The change to section 3041.5(b)(2)(B) is therefore beyond the scope of the *Ex Post Facto* Clause.

In the case below, the Ninth Circuit did little more than simply assert that the change in parole law makes defendant's punishment more severe. It notes that the change in law "eliminate[s] the possibility of parole altogether in the period between the hearings." *Morales* v. *California Department of Corrections*, 16 F. 3d 1001, 1004 (CA9 1994). It dismisses the remoteness of Morales actually getting parole in the intervening years by stating that his "claim does not depend on being able to demonstrate that he would have received parole sooner if he were granted annual parole hearings." *Id.*, at 1005. The lower court then concludes that Morales' *ex post facto* rights were violated because California deprived him of " 'fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.' " *Ibid.* (quoting *Weaver*, *supra*, 405 U. S., at 30).

The essence of this emaciated argument is the notion that defendant does not have to show that his sentence is higher as a result of the change in law. This theory is derived from a statement in *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937). "But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed".[6] The *Lindsey* statement is too weak a reed to support

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6. The Ninth Circuit does not cite *Lindsey* to support its theory but instead cites one of its own cases, *Flemming* v. *Oregon Board of Parole*, 998 F. 2d 721 (CA9 1992). *Morales*, *supra*, 16 F. 3d, at 1005. However, *Flemming* is based on *Lindsey*. See *Flemming*, *supra*, 998 F. 3d, at 725.

the Ninth Circuit's assertion. In the first place, *Lindsey* involved a complex change of law that drastically increased the minimum punishment that defendant had been entitled to under the old indeterminate sentencing scheme. See *id.*, at 398-399. This is manifestly distinguishable from the present statute, which leaves defendant's minimum sentence untouched. More importantly, the "standards of punishment" arguments of *Lindsey* was dependent upon the now overruled "substantial right" holding of *Kring* v. *Missouri*, 107 U. S. 221 (1883). See *ante*, at 23-24. *Collins* v. *Youngblood*, 497 U. S. 37 (1990), by overruling *Kring*, eliminated whatever precedential value the *Lindsey* dicta had. Unfortunately, the specter of *Kring* lives on in the Ninth Circuit.[7] It is time for this Court to remove that ghost once and for all.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
KEVIN WASHBURN
Attorneys for Amici Curiae
*Attorney of Record

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7. The continuing influence of *Kring* is also shown by the way the Ninth Circuit invoked the expansive, *Kring*-dependent dicta of *Weaver* to dismiss the argument that the change was only procedural. See *ante*, at 13-14.